No. 70-91

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH PARISI, PETITIONER

v.

MAJOR GENERAL PHILLIP B. DAVIDSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The opinion of the court of appeals (App. 61-94)[1] is reported at 435 F. 2d 299. The separate orders of the district court partially denying a preliminary injunction (App. 29-31) and staying further proceedings pending exhaustion of military judicial remedies (App. 52-55) are not reported.

JURISDICTION

The judgment of the court of appeals (App. 95-96) was entered on December 3, 1970. The petition for

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[1] "App." references are to the joint appendix on file with the Clerk of this Court.

a writ of certiorari was filed on March 1, 1971; it was granted on May 3, 1971 (App. 97; 402 U.S. 942). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly stayed this habeas corpus action, to review the Department of the Army's denial of petitioner's conscientious objector claim, until a final adjudication of the claim in pending court-martial proceedings.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Uniform Code of Military Justice (Arts. 66 and 67, 10 U.S.C. 866 and 867); The All Writs Act (28 U.S.C. 1651(a)); relevant portions of Department of Defense Directive No. 1300.6; and relevant portions of Army Regulations AR 635-20 and 635-200, are set forth in Appendix A, *infra*, at pp. 52-58.

STATEMENT

The essential facts are set forth in the margin of the court of appeals' opinion (App. 75-84, n. 1), and are not here in dispute.

Petitioner was inducted into the Army as a draftee on August 22, 1968. Nine months later he applied for discharge as a conscientious objector, claiming that many of the doubts he had initially had about military service had developed through his Army experiences into a firm conviction that participation in any

form of military activity conflicted irreconcilably with his Christian beliefs. He was interviewed by the base Chaplain, the base psychiatrist, a special hearing officer and his immediate supervisor, as required by Army Regulation AR 635-20; and they all attested to petitioner's sincerity and the religious content of his professed beliefs. In addition, the Commanding General of petitioner's Army training center and the Commander of the Army hospital, although they conducted no personal interview, recommended that petitioner be discharged as a conscientious objector. Petitioner's immediate commanding officer disagreed; he recommended disapproval of the application on the ground that petitioner's beliefs were "based on essentially political, sociological, or philosophical views, or on a merely personal moral code." AR 635-20, para. 3b(3).

In November 1969, the Department of the Army denied petitioner conscientious objector status on grounds that his professed beliefs, although perhaps rooted in religious training, had become fixed prior to induction into the military, and, moreover, failed to demonstrate that he was truly opposed to participation in all war. On November 24, 1969, petitioner applied to the Army Board for Correction of Military Records for administrative review of that determination.

Shortly thereafter, on November 28, 1969, he also commenced the present habeas corpus proceeding in the United States District Court for the Northern District of California. Claiming that the military's

denial of his conscientious objector application was without basis in fact. He sought discharge from the Army, and requested a preliminary injunction to prevent his transfer from the jurisdiction of the district court and to prohibit further training preparatory to being transferred to Vietnam. Following a hearing, the district court (App. 29-31) declined at that time to entertain the habeas corpus petition, but it retained jurisdiction of the case pending a decision on petitioner's conscientious objector application by the Army Board for Correction of Military Records. The Army was ordered to refrain from requiring petitioner to participate in activity or training beyond his current noncombatant duties; however, the district court refused to enjoin the Army from transferring petitioner outside the judicial district.

On December 4, 1969, petitioner appealed that part of the order denying a stay of transfer; at about the same time, he received orders to report, on December 31, 1969, to the Overseas Replacement Station at Oakland, California. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Petitioner then sought an order staying his deployment outside the court's jurisdiction pending disposition of his appeal. The stay was denied by a two-judge panel of the Ninth Circuit Court of Appeals on December 10, 1969, on condition that the Army produce petitioner if the appeal should result in his favor (App. 32-33). On December 29, 1969, a similar application for stay was denied by Mr. Justice Douglas (App. 34-37; 396 U.S. 1283).

Petitioner reported to his duty station at Fort Lewis, Washington, on December 31, 1969. At that time, he requested an opportunity to file a second application for discharge as a conscientious objector and, as required under AR 635-20, he was given seven days to complete and file such an application. On January 6, 1970, he informed the Personnel Center that he no longer wished to submit the application. He was then booked for transportation overseas, where he was to perform noncombatant duties similar to those which had been assigned to him and which he had performed in this country. He refused, however, to obey a military order to board the plane for Vietnam. As a result, petitioner was charged with violation of Article 90 of the Uniform Code of Military Justice, 10 U.S.C. 890,[2] and was confined to the post stockade pending disposition of the charge against him.

On March 2, 1970, while the court-martial was pending, the Army Board for Correction of Military Records notified petitioner that it had rejected his application for relief from the denial of his conscien-

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[2] The provision reads in pertinent part that:

> Any person subject to this chapter who—
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> * * * * *
>
> (2) wilfully disobeys a lawful command of his superior commissioned officer;
>
> shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

tious objector claim.[3] The district court, on March 6, 1970, issued an order to the Army to show cause why petitioner's pending writ of habeas corpus should not now issue. On the government's motion (App. 45-50), the district court, on March 31, 1970, entered an order staying consideration of petitioner's habeas corpus petition until final judgment in the military courts on the court-martial charges (App. 52-55). Petitioner took an appeal from that order.[4]

On April 8, 1970, the court-martial convicted petitioner on the charge of refusing to obey a lawful military order (App. 58-60). The military judge found that the denial of petitioner's conscientious claim had not been arbitrary, capricious, unreasonable, or an abuse of discretion; he declined, however, to apply the "basis in fact" standard of review that would be applied on habeas corpus in a district court (App. 89-91, n. 11). Petitioner is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence of two years at hard labor, with dishonorable discharge. His appeal from the court-martial conviction is currently pending before the Court of Military Review.

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[3] The letter, a copy of which was filed in the district court and has been reproduced in Appendix B, *infra*, pp. 59-60, stated: "Following examination and consideration of your Army records together with such facts as presented by you, the Army Board for Correction of Military Records on 11 February 1970 determined that insufficient evidence has been presented to indicate probable material error or injustice."

[4] At petitioner's request, the district court, on March 17, 1970, dismissed the first interlocutory appeal of that court's denial of a stay of transfer, initiated by petitioner on December 4, 1969.

On December 3, 1970, the court of appeals (App. 61-94) affirmed the district court's stay order. It held that "[a] serviceman facing court-martial should not be permitted habeas relief in a federal court during the pendency of his military trial and appeals therefrom, except, perhaps, when it might appear that no military tribunal to which he has recourse is capable of granting an appropriate remedy" (App. 71). Looking to the military judicial system, the court found that petitioner could, and indeed did, raise the denial of his conscientious objector claim as a defense to his court-martial; if that defense ultimately succeeds, the court suggested, the military courts had ample power under the All Writs Act, 28 U.S.C. 1651(a), to grant petitioner discharge from the Army (App. 72-74, 94, n. 13).

SUMMARY OF ARGUMENT

A. "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U.S. 83, 94. To maintain more rigid standards of order and control within the armed services, Congress, in the exercise of its War Powers, has constructed an autonomous military judicial system. That system is no less responsible to the Constitution and the laws of the United States than its civilian counterpart. Consequently, federal courts have traditionally demonstrated a marked reluctance to intervene precipitately in matters before military tribunals, either to obviate exposure to court-martial or to anticipate the results of a court-martial. They have, instead, in-

voked the doctrine of exhaustion of military remedies in the interest of avoiding "[n]eedless friction" between federal courts and the military system. *Noyd* v. *Bond*, 395 U.S. 683, 696.

B. The court below properly applied the exhaustion principle in the present case. At the time that petitioner's in-service conscientious objector application had been processed through the Army's administrative channels and ultimately denied by the Army Board for Correction of Military Records, petitioner was already facing court-martial charges for refusal to obey military orders, the military tribunal had been convened and the trial itself was imminent. In these circumstances, requiring him to exhaust available judicial remedies within the Army would not force him "* * * to commit a further military 'crime' in order to provide himself with a forum. He had already done the act alleged to be unlawful" (App. 68).

Just as in a Selective Service context, "the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created" (*McKart* v. *United States*, 395 U.S. 185, 195), so too in the present context, it must be adapted to the special features of the internal review machinery that has been set up for the military. Responsibility for maintaining order and discipline within the armed services has been vested by Congress in military tribunals; it is not a function of the civil courts. Where, as here, a serviceman chooses, "with all attendant risks, to disobey a military order to enplane for Vietnam" (App. 63), the statutory scheme calls for civil-

ian deference to judicial review by the agency which "has a proper concern in keeping its own house in order" (*O'Callahan* v. *Parker*, 395 U.S. 258, 282; Harlan, J., dissenting).

C. Nor do we agree with petitioner's assertion that the military tribunals to which he has recourse are incapable of granting an appropriate remedy. The Court of Military Appeals has recently held in *United States* v. *Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195, that the administrative denial of conscientious objector status can be challenged in court-martial proceedings for refusal to obey military orders similar to those involved here. That decision, though not without its detractors on the highest military tribunal, remains inviolate today and is followed by the lower military courts. Indeed, petitioner's court-martial entertained his affirmative defense of wrongful denial of discharge by the Secretary, but decided against him on the merits. The argument, however, is still available to him in the Court of Military Review.

If petitioner should ultimately succeed with his affirmative defense, the Secretary "has no practical alternative except to discharge [him]." *United States* v. *Stewart*, 20 U.S.C.M.A. 272, 276, 43 C.M.R. 112, 116. In such circumstances, the Judge Advocate General is required by regulation to follow the same procedures that apply when "[t]he discharge or release of an individual from the Army [is] ordered by a U.S. Court or judge thereof." Army Regulation AR 635-200. Moreover, petitioner has an available remedy by way of habeas corpus in the Court of Military Appeals. That tribunal, established by Act of Con-

gress, has power under the All Writs Act to grant extraordinary relief in cases, like the present one, which are subject to its jurisdiction. Where a military court over which the Court of Military Appeals concededly has jurisdiction, or the Court of Military Appeals itself, determines that a serviceman was wrongfully denied discharge as a conscientious objector, there seems every reason to assume that the highest military tribunal, although it has not yet been called upon to do so, will entertain a habeas petition seeking to effectuate that discharge as a legitimate exercise of its "supervisory power over the administration of military justice." *Gale* v. *United States*, 17 U.S.C.M.A. 40, 42, 37 C.M.R. 304, 306.

D. Resort to these military tribunals does not foreclose civilian review; it merely delays consideration by the federal courts until it becomes clear that a final determination of the issues has been made within the military judicial system and a live controversy still remains. If such delay seems unduly harsh to petitioner, that is the necessary consequence of his own action. Had he bided his time for approximately one month, it appears now that he would have obtained the relief he sought from the district court. Having deliberately elected, instead, to defy a military order to report for "psychological counseling" duty in Vietnam, he is in no position to complain of the delay occasioned by permitting the military to prosecute him for such disobedience. Moreover, in the present case, the delay of which petitioner complains is substantially of his own making. Through no less than seven requests for "enlargement of time,"

he has succeeded in bringing the proceedings in the Court of Military Review to a grinding halt for a period of some nine months. In these circumstances, his objection to an application of the exhaustion doctrine on the ground of "unconscionable delay" is not well taken.

ARGUMENT

A SERVICEMAN SHOULD BE DENIED ACCESS TO THE CIVIL COURTS FOR EXTRAORDINARY RELIEF UNTIL FINAL DISPOSITION OF HIS CLAIMS ON RELATED ISSUES PENDING BEFORE MILITARY TRIBUNALS

A. The Civil Courts and the Military

While the law of habeas corpus generally has application in the context of prisoners seeking release from incarceration under criminal convictions (*e.g.*, *Fay* v. *Noia*, 372 U.S. 391), "there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones* v. *Cunningham*, 371 U.S. 236, 240. Thus, the writ has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully detained in the Armed Forces. See, *e.g.*, *Eagles* v. *Samuels*, 329 U.S. 304, 312; *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 235; *Schlanger* v. *Seamans*, 401 U.S. 487, 489.[5]

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[5] Such persons are considered to be "in custody" as that term is used in 28 U.S.C. 2241, in the sense that they are subject to military orders and control which act as a restraint on their freedom of movement. See *Jones* v. *Cunningham*, *supra*, 371 U.S. at 240; *Hammond* v. *Lenfest*, 398 F. 2d 705, 710-712 (C.A. 2).

1. But "the scope of matters open for review" on military habeas corpus applications is "more narrow" than when similar relief is sought by civilians. *Burns* v. *Wilson*, 346 U.S. 137, 139. "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff* v. *Willoughby*, 345 U.S. 83, 94. Thus, in *Burns* this Court stated (346 U.S. at 142) that, "when a military [judicial] decision has dealt fully and fairly with an allegation raised in [the habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." See *United States* v. *Augenblick*, 393 U.S. 348, 351-352.[6] And in *Orloff*, the Court reaffirmed the general principle (*United States* v. *Eliason*, 16 Pet. 291, 301-302; *Reaves* v. *Ainsworth*, 219

[6] The "fully and fairly" test has generally been interpreted as confining collateral attacks on court-martial judgments to questions of the court-martial's jurisdiction over the person tried and the offense charged (see *O'Callahan* v. *Parker*, 395 U.S. 258; compare *Relford* v. *Commandant*, 401 U.S. 355), to alleged denials of substantive due process which, although perhaps raised, were not considered by the military tribunal, and to claims that the convicted serviceman was not afforded all procedural safeguards necessary to a fair trial under military law. See *Gorko* v. *Commanding Officer*, 314 F. 2d 858, 859 (C.A. 10); *Kennedy* v. *Commandant*, 377 F. 2d 339 (C.A. 10); *Davies* v. *Clifford*, 393 F. 2d 496 (C.A. 1); *King* v. *Moseley*, 430 F. 2d 732 (C.A. 10); *Swisher* v. *United States*, 237 F. Supp. 921, 924-929 (W.D. Mo.), affirmed, 354 F. 2d 472, 475 (C.A. 8); but see *Kauffman* v. *Secretary of the Air Force*, 415 F. 2d 991, 996-997 (C.A. D.C.).

U.S. 296, 306; *Patterson* v. *Lamb*, 329 U.S. 539, 542) that routine administrative determinations by the military, such as duty assignments or officers' commissions, are matters "not within the power" (345 U.S. at 93) of civil courts to review by habeas corpus. See *Brown* v. *McNamara*, 387 F. 2d 150 (C.A. 3), certiorari denied, 390 U.S. 1005.

This policy of judicial abstention in matters touching on military affairs is rooted in "the doctrine of separation of powers and the responsibility for national defense which the Constitution, Art I, § 8, cl. 1 and Art. II, § 2, places upon the Congress and the President." *Hammond* v. *Lenfest*, *supra*, 398 F. 2d at 710 (C.A. 2). As observed in *Burns* v. *Wilson*, *supra*, 346 U.S. at 140, "* * * Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." [7] Within the confines of this statutory frame-

[7] Military courts are legislative courts created by Congress under U.S. Const., Art. I, § 8; their jurisdiction is independent of Article III judicial power. *In re Vidal*, 179 U.S. 126, 127; *Dynes* v. *Hoover*, 20 How. 65, 79. See generally Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. Cin. L. Rev. 223 (1967). Following World War II, Congress, in "an effort to reform and modernize the system—from top to bottom" (*Burns* v. *Wilson*, *supra*, 346 U.S. at 141), extensively revised the Articles of War (62 Stat. 627) and by the Act of May 5, 1950, ch. 169, 64 Stat. 107, created the Uniform Code of Military Justice. Under the new Code, a Court of Military Appeals was created with automatic jurisdiction to review all capital cases and discretionary jurisdiction over non-capital cases. U.C.M.J., Art. 67(b), 10 U.S.C. 867(b). In 1968, the Code was amended by the Military Justice Act (10 U.S.C. (Supp. V) 819) to improve court-martial and review procedures. See discussion *infra*, pp. 42-44.

work, civil courts have traditionally exercised no power of supervision or review. See *In re Grimley*, 137 U.S. 147, 150. Deference to military jurisprudence is therefore grounded on considerations of autonomy, on judicial recognition that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." *Burns* v. *Wilson*, *supra*, 346 U.S. at 140.

2. This is essentially the same rationale that sustains the exhaustion requirement in military habeas corpus proceedings. Some twenty years ago, this Court, in *Gusik* v. *Schilder*, 340 U.S. 128, declined to hear a serviceman's challenge to his court-martial conviction of murder on the ground that he had failed first to apply to the Judge Advocate General for a new trial.[8] Analogizing the situation to a state prisoner petitioning for federal relief, the Court stated (340 U.S. at 131-132):

> If the state procedure provides a remedy, which though available has not been exhausted, the fed-

[8] This remedy was added to the Articles of War, Art. 53, 62 Stat. 639, 10 U.S.C. (1946 ed. Supp. III) 1525, after the district court had granted the petitioner's writ of habeas corpus and ordered him released on bond. The court of appeals reversed (180 F. 2d 662 (C.A. 6)) on the ground that Gusik had failed to exhaust all his military remedies and this Court affirmed, stating that the policy of non-interference prior to exhaustion "is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created * * *." 340 U.S. at 132.

> eral courts will not interfere. * * * The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

To be sure, principles of federalism that discourage precipitous judicial intervention in state proceedings in the interest of comity (see *Fay* v. *Noia*, 372 U.S. 391, 418; *Younger* v. *Harris*, 401 U.S. 37, 43-45) do not come into play when military custody is challenged. *Noyd* v. *Bond*, 395 U.S. 683, 694. Nevertheless, Congress, in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const., Art. I, § 8, cl. 14), has chosen to entrust the protection of the rights of servicemen in the first instance to military tribunals, with direct review to a Court of Military Appeals, composed of disinterested civilian judges. U.C.M.J., Art. 67(a)(1), 10 U.S.C. 867(a)(1). These military courts are no less responsible to the Constitution and laws of the United States than their civilian counter-

parts (see *Harmon* v. *Brucker*, 355 U.S. 579; *Burns* v. *Wilson*, *supra*, 346 U.S. at 142).

The efficient functioning of our federal legal system thus suggests that civil courts should stay their hand as long as there remain appropriate military channels to provide full and fair consideration of the claims. See *Beard* v. *Stahr*, 370 U.S. 41; *Doyle* v. *Koelbl*, 434 F. 2d 1014 (C.A. 5), certiorari denied, 402 U.S. 908; and cf. *United States ex rel. Berry* v. *Commanding General*, 411 F. 2d 822 (C.A. 5). The military, no less than other federal administrative agencies (see, *e.g.*, *McGee* v. *United States*, 402 U.S. 479; compare *McKart* v. *United States*, 395 U.S. 185) should be allowed the opportunity to correct errors—whether they be administrative or judicial—through its own internal review processes. *Cf. Sohm* v. *Fowler*, 365 F. 2d 915 (C.A.D.C.); *McCurdy* v. *Zuckert*, 359 F. 2d 491 (C.A. 5), certiorari denied *sub nom. McCurdy* v. *Brown*, 385 U.S. 903; *Anderson* v. *MacKenzie*, 306 F. 2d 248 (C.A. 9); *Michaelson* v. *Herren*, 242 F. 2d 693 (C.A. 2). In the absence of any jurisdictional dispute,[9] it is plainly not the function of the federal judiciary to intervene precipitately in matters pending before military tribunals either to obviate exposure to court-martial or to anticipate the results of a court-martial. See *Wales* v. *Whitney*,

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[9] The requirement of exhaustion of military remedies has been relaxed by this Court where persons, unlike petitioner in the instant case, are not in the service and contest the underlying jurisdiction of the military to apply military law to them. See *Toth* v. *Quarles*, 350 U.S. 11; *Reid* v. *Covert*, 354 U.S. 1; *McElroy* v. *Guagliardo*, 361 U.S. 281. And cf. *O'Callahan* v. *Parker*, *supra*. See also n. 25 *infra*.

114 U.S. 564; *Gusik* v. *Schilder*, *supra*. Indeed, "the ever-present and urgent need for discipline in the armed services" (*Hammond* v. *Lenfest*, *supra*, 398 F. 2d at 710) is itself strong reason for civilian deference to this carefully constructed military court system that Congress has created. Cf. *Burns* v. *Wilson*, *supra*, 346 U.S. at 140.

Federal courts have accordingly declined to entertain habeas corpus applications of servicemen challenging either administrative (see, *e.g.*, *Beard* v. *Stahr*, 370 U.S. 41; *Minasian* v. *Engle*, 400 F. 2d 137 (C.A. 9); *Sohm* v. *Fowler*, *supra*) or judicial (see, *e.g.*, *Gusik* v. *Schilder*, 340 U.S. 128; *Noyd* v. *Bond*, 395 U.S. 683; *In re Kelly*, 401 F. 2d 211 (C.A. 5); *Doyle* v. *Koelbl*, *supra*) determinations by the military while appropriate channels for review remain open within the armed services. Unlike *Burns*, *Orloff*, and their progeny, the focus of these decisions is on the timeliness of judicial review by civil courts, not on its ultimate availability; and the doctrine of exhaustion of military remedies is invoked in the interest of avoiding "[n]eedless friction" between federal courts and the military system." *Noyd* v. *Bond*, 395 U.S. 683, 696.

B. Applying the Exhaustion Requirement in the Instant Case

The question presented here does not fit comfortably into either the line of authorities requiring exhaustion of military administrative remedies or those decisions calling for exhaustion of military judicial remedies. It falls, instead, somewhere in between

and is in large measure obscured by the procedural context in which it arises.

1. Prior to filing his habeas corpus application in the district court challenging the Army's administrative denial of his conscientious objector claim, petitioner elected to apply for review to the Army Board for Correction of Military Records ("ABCMR").[10] The Army board, unlike its counterpart in the Department of the Navy (see *Craycroft* v. *Ferrall*, 408 F. 2d 587 (C.A. 9), vacated and remanded, 397 U.S. 335), does take cognizance of in-service conscientious objector claims (cf. *Krieger* v. *Terry*, 413 F. 2d 73 (C.A. 9); *Bratcher* v. *McNamara*, 415 F. 2d 760 (C.A. 9)), and, as evidenced by the present case, reviews the administrative record to ascertain if the denial of the claim by the Adjutant General is in any respect erroneous or unjust. See n. 3 *supra*.[11]

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[10] In 1946, Congress enacted legislation (60 Stat. 812, 837) empowering the service secretaries, acting through boards of civilian officers of their respective departments, to alter military records when necessary to prevent injustice. Legislative Reorganization Act § 207, amended, 70A Stat. 116, 10 U.S.C. (1952 ed., Supp. IV), 1552. Pursuant to this legislation, each service established a board for correction of military records, see *e.g.*, Army Regulation AR 15-185; the board's function is, on application by a serviceman, to review the military record and intervene where it finds it necessary to do so "to correct an error or remove an injustice." 10 U.S.C. 1552(a).

[11] Because the Board for the Correction of Naval Records does not take cognizance of conscientious objector claims, the government advised this Court in *Craycroft* v. *Ferrall*, *supra* (see Gov't Mem., No. 718 Misc., October Term 1969, p. 5) that it could not agree with the Ninth Circuit's insistence that Craycroft first apply to the Navy correction board "[s]ince the remedy envisaged by the court below would thus clearly

Although the government at one time took the position that recourse to ABCMR was an available administrative remedy within the military that had to be exhausted before servicemen were entitled to resort to the civilian courts for extraordinary relief (see *Krieger* v. *Terry*, *supra*; *Bratcher* v. *McNamara*, *supra*; compare *United States ex rel. Brooks* v. *Clifford*, 409 F. 2d 700, 701 (C.A. 4), it is now the policy of the Department of Justice, as set forth in Mem. No. 652 which appears in Appendix C, *infra*, at pp. 61-62, to treat the action taken by the Adjutant General as the final administrative determination that is "ripe for judicial review" (Appendix C, *infra*, p. 61).

We do not believe, however, that this new policy precludes a district court from electing to defer consideration of the factual basis for denial of an in-service conscientious objector claim where the identical question is already pending before the administrative correction board at the time that the habeas corpus petition is filed. Nor has petitioner raised any objection to such a procedure.[12] It is well recognized

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have been futile." This Court vacated the judgment and remanded the cause to the Ninth Circuit (397 U.S. 335), noting especially the Solicitor General's concession that "the administrative remedies * * * have either been exhausted or are nonexistent."

[12] Petitioner initially took an appeal only from the district court's denial of his request for an injunction against transfer outside the judicial district. On March 17, 1970, that appeal was dismissed by the Ninth Circuit on petitioner's request. In the subsequent appeal from the district court's order staying further proceedings, petitioner did not contest the earlier stay pending a decision by the Army correction board, and he has not done so before this Court.

that application of the rule of exhaustion of administrative remedies requires the exercise of judicial discretion. See *United States* v. *Abilene & So. Ry. Co.*, 265 U.S. 274, 282. That discretionary power has not been abused, in our view, where its exercise merely results in a postponement of judicial review until it is known whether petitioner's recourse to "competent" administrative channels (*Parisi* v. *Davidson*, 396 U.S. 1233, 1234 (opinion of Douglas, J.)) will moot the controversy.[13] Moreover, in the instant case the district court (App. 30), having decided to "retain jurisdiction * * * until decision * * * by the [Army correction board]," took the additional precaution of ordering that petitioner not be assigned in the interim "to any duties which require materially greater participation in combat activities or combat training than is required in his present duties."[14] In these circumstances, we think that the court cannot be faulted

[13] This is not a case in which an application of the exhaustion doctrine would foreclose all access to the federal courts. In such situations, this Court has indicated, in the context of a state prisoner seeking habeas corpus relief in federal courts, that judicial discretion should be more narrowly defined to permit its exercise only where it is clear that there has been a "deliberate by-passing of state procedures." *Fay* v. *Noia*, *supra*, 372 U.S. at 439.

[14] Army Regulation AR 635-20, paras. 6(a) and (d), requires assignment of servicemen claiming conscientious objector status to "duties providing the minimum practical conflict with their asserted beliefs" pending a final decision on their application by the Adjutant General; if he denies relief, it provides that they may "be assigned to any duties, or be required to participate in any type of training" even though they seek further review by the Army Board for Correction of Military Records. Appendix A, *infra*, p. 57.

for its initial refusal to entertain petitioner's habeas application.

2. Not long after this determination by the district court, but over a month before ABCMR rendered its decision, petitioner received orders to report to a West Coast departure station for assignment to noncombatant military service in Vietnam (*supra*, p. 4). On his ensuing applications for a stay of deployment, these orders came under the close scrutiny of two Ninth Circuit judges (App. 32-33) and Mr. Justice Douglas (App. 34-37), respectively; in each instance, they were upheld. As Mr. Justice Douglas pointed out (App. 36-37; 396 U.S. at 1234):

> Applicant is at present assigned to duties of "psychological counseling." It would seem offhand that "psychological counseling" in Vietnam would be no different from "psychological counseling" in army posts here. He would, of course, be closer to the combat zones than he is at home; and he says that he could end up carrying combat weapons.
>
> I heretofore granted like stays * * * involving deployment of alleged conscientious objectors to Vietnam. * * * But this case is different because of the protective orders issued by the District Court and the assurance given the Court of Appeals that the applicant will be delivered in the Northern District if he wins his habeas corpus case. * * *

Petitioner nonetheless refused to board the plane to Vietnam on January 7, 1970; he was charged with "wilfully disobey[ing] a lawful command of his superior commissioned officer" (U.C.M.J., 10 U.S.C. 890) and confined to the post stockade.

Approximately one month later, ABCMR upheld the denial of petitioner's conscientious objector claim (see n. 3 *supra*) and thus eliminated the prior bar to habeas corpus; the district court then issued its show cause order as to why it should not entertain the application for extraordinary relief. But, as noted by the court below (App. 67-68), "charges had then already been filed against Parisi by the military authorities, the tribunal that was to judge him had already been convened, and the trial itself was imminent."

3. In light of this turn of events, the issue now before the Court is not, as petitioner would have us believe, identical to the question that confronted the Second Circuit in *Hammond* v. *Lenfest*, 398 F. 2d 705 (C.A. 2). There, at the time that the serviceman's conscientious objector claim was denied by the final administrative authority (the Chief of the Bureau of Naval Personnel),[15] no court-martial charges were pending.[16] The court of appeals, carefully limit-

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[15] As already noted (*supra*, n. 11), the Board for Correction of Navy Records does not take cognizance of in-service conscientious objector claims.

[16] This was also the situation in *Crane* v. *Hedrick*, 284 F. Supp. 250 (N.D. Cal), and *Talford* v. *Seaman*, 306 F. Supp. 941 (D. Md.), two cases on which petitioner places heavy reliance. In *Crane*, although the applicant had jumped ship prior to filing his habeas corpus application, the Navy declined to prefer court-martial charges against him (284 F. Supp. at 251, 252-253). In *Talford*, the applicant was similarly subject to court-martial, but the Army decided not to press charges against him until after the civil court had disposed of his request for extraordinary relief, and, if he prevailed in the district court, to abandon court-martial proceedings altogether (306 F. Supp. at 944).

ing its holding to "the precise contentions and factual situation presented" (398 F. 2d at 710), rejected the argument that in such circumstances Hammond's claims were not ripe for judicial review because he could still disobey a lawful military order and raise his claims as a defense to the ensuing court-martial. Compare *Noyd* v. *McNamara*, 378 F. 2d 538 (C.A. 10). To "require that Hammond await the outcome of a yet to be convened court martial before petitioning for a writ of habeas corpus" (398 F. 2d at 713), and thus force him to "risk * * * the imposition of additional sanctions" (398 F. 2d at 714) was, in the court's view, too harsh a condition to judicial review of a final administrative determination by the military with respect to conscientious objector status. Moreover, as the Second Circuit pointed out, Hammond was without "power to convene the court martial that is supposedly to judge him" (*ibid.*); accordingly, compelling him to await such further enforcing procedure as the agency might or might not choose to initiate offered no real remedy.[17] And see *Crane* v. *Hedrick*, *supra*; *Talford* v. *Seaman*, *supra*.

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[17] Hammond could not, at that time, have initiated habeas corpus proceedings in the Court of Military Appeals to test the lawfulness of the Secretary's action. Under the All Writs Act, 28 U.S.C. 1651, that court is empowered to grant extraordinary relief only in appropriate cases that fall within its Article 67 jurisdiction (see pp. 42, 45, *infra*). Accordingly, before the Court of Military Appeals could have properly entertained a habeas corpus application in Hammond's case, the issue of wrongful-denial-of-discharge would first have had to be litigated in court-martial proceeding for disobedience of military orders, and the decision reviewed by the Court of Military Review. See *Mueller* v. *Brown*, 18 U.S.C.M.A. 534, 40 C.M.R. 246.

In response to *Hammond*, the Department of Justice has abandoned the position it took in that case and in *Noyd* v. *McNamara*, *supra*. Following the lead of the Second Circuit, it now supports review by the civil courts in comparable situations: "If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Courts." See Appendix C, *infra*, p. 61.[18]

But the instant case does not fit that category. Here, as earlier indicated, by the time ABCMR had decided that petitioner was not entitled to conscientious objector status, and thus eliminated the prior bar to habeas corpus, court-martial charges had already been preferred. An application of the exhaustion principle in these circumstances would therefore not require petitioner "* * * to commit a fur-

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[18] We first informed the Court of this new policy in our memorandum in *Craycroft* v. *Ferrall*, No. 718 Misc., October Term, 1969, certiorari granted and cause remanded to the Ninth Circuit, 397 U.S. 335. More recently, we took the same position in *Polsky* v. *Wetherhill*, No. 1656, October Term, 1970, certiorari granted and cause remanded to the Tenth Circuit for consideration on merits, 403 U.S. 916. In *Polsky*, the Tenth Circuit sitting *en banc*, despite the fact that the government had intentionally acquiesced in habeas corpus jurisdiction, decided *sua sponte*, to adhere to its earlier ruling in *Noyd* v. *McNamara*, *supra*, by requiring exhaustion of not yet convened court-martial proceedings as a condition to its consideration of Polsky's conscientious objector claim. We disagreed with that determination and recommended that the case be remanded for consideration or the merits of Polsky's claim (Memorandum for the United States, No. 1656, October Term, 1970).

ther military 'crime' in order to provide himself with a forum. He had already done the act alleged to be unlawful" (App. 68). Whatever the "risk of * * * imposition of additional sanctions" (*Hammond* v. *Lenfest*, 398 F. 2d at 714), petitioner has already undertaken that risk by failing to comply with a military order. Having traversed that route, and military judicial proceedings being commenced, before a final administrative ruling on his conscientious objector application, it was, we think (see Appendix C, *infra*, p. 61), incumbent upon him to exhaust his military judicial remedies before gaining access to the civilian courts by way of habeas corpus See *Gusik* v. *Schilder*, 340 U.S. 128; *Noyd* v. *Bond*, 395 U.S. 683; and cf. *Hammond* v. *Lenfest*, *supra*, 398 F. 2d at 713.[19] And, indeed, the only two circuit courts that have yet had occasion to rule on the exhaustion question in this context have so held.[20] See *In re Kelley*, 401 F. 2d

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[19] Following *Hammond*, the Second Circuit was presented with the question that is now before the Court in this case in *United States ex rel. Mankiewicz* v. *Ray*, 399 F. 2d 900 (C.A. 2), but found it unnecessary to decide the issue. As pointed out by Judge Friendly, concurring (399 F. 2d at 902), *Hammond* has not yet been extended "to a case where a court-martial had already been convened and there was no adequate showing that it would not consider Mankiewicz' defense."

[20] The two district court decisions that seemingly take a contrary view are *Gann* v. *Wilson*, 289 F. Supp. 191 (N.D. Cal.), and *Cooper* v. *Barker*, 291 F. Supp. 952 (D. Md.), both cited by petitioner. Those cases, however, each involved the situation where an already convened court-martial was trying the serviceman for disobeying an order to wear his uniform; as to that offense, the contention that the Secretary's administrative denial of conscientious objector status was

211 (C.A. 5); *Locks* v. *Laird*, 441 F.2d 479 (C.A. 9).[21]

4. The reason for such a rule is admittedly not grounded on the same consideration that this Court viewed as "pivotal" in a separate context in *McGee* v. *United States*, 402 U.S. 479: *i.e.*, to allow the administrative agency "to make a factual record, or to exercise its discretion or apply its expertise" 402 U.S. at 485. Compare *McKart* v. *United States*, 395 U.S. 185. Plainly, judicial review of the factual basis for the Army's denial of petitioner's conscientious objector claim does not require an interpreta-

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without basis in fact is concededly no defense (see *Coombs* v. *Commanding General*, W.D. La., Civ. No. 16,573, decided August 21, 1971, slip op. p. 2; and see *infra* p. 35 n. 34). Consequently, the court-martial proceedings offered no opportunity for further consideration within the military of the claims raised in the habeas corpus applications; the district courts' refusal to *Gann* and *Cooper* to require exhaustion of pending judicial remedies in such circumstances was proper. Cf. *Wolff* v. *Selective Service*, 372 F. 2d 817, 825 (C.A. 2). Here, by contrast, the claim raised in the habeas corpus application is considered an available defense to the court-martial charge of refusal to obey an order of deployment to Vietnam. See discussion *infra*, pp. 32-38.

[21] Only one of the four petitioners in *Locks* was facing court-martial proceedings at the time that the habeas corpus application was filed. As to that petitioner, we are of the view that the Ninth Circuit's application of the exhaustion doctrine was correct. The other three petitioners in that case stood on a different footing, however. Whether or not it was proper also to defer consideration of their identical claims because "a declaratory judgment of unconstitutionality would for all practical purposes terminate the criminal case against" the one who had failed to exhaust (441 F. 2d at 480), is a question we need not reach at this time.

tion of "extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence" (*Noyd* v. *Bond*, *supra*, 395 U.S. at 696). The underlying rationale rests, instead, on other considerations which, we submit, require civilian deference to military tribunals in the circumstances of this case.

Those in the armed services are necessarily subject to stricter standards of discipline and duty than are civilians. See generally *Burns* v. *Wilson*, *supra*, 346 U.S. at 140; *Orloff* v. *Willoughby*, 345 U.S. at 95; *Reid* v. *Covert*, *supra*, 354 U.S. at 38-39. Long ago, our Founding Fathers granted to the Congress "authority to regulate the armed forces in order to enforce obedience by members of the military establishment to military regulation during their service to the end that order may be ensured." *Toth* v. *Quarles*, *supra*, 350 U.S. at 31 (Reed, J., dissenting).[22] Pursuant thereto, Congress has devised a separate, autonomous military judicial system (see n. 7 *supra*) to maintain control, morale and discipline. See U.C.M.J., Arts. 16-21, 65, 66, 67, 10 U.S.C. 816-821, 865, 866, 867. As this Court declared in *Toth* (350 U.S. at 22): "Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order." After trial by court-martial, review is available in

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[22] In addition to its power "To raise and support Armies" and "To provide and maintain a Navy" (Art. I, Sec. 8, cls. 12 and 13), Congress is expressly given power "To make Rules for the Government and Regulation of the land and naval Forces" (*id.* at 14).

most cases by a Court of Military Review, composed of a panel of three military judges (see U.C.M.J., Art. 66, 10 U.S.C. 866).[23] And, "[w]hen, after the second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd* v. *Bond*, *supra*, 395 U.S. at 694.[24]

Just as in a Selective Service context "the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created" (*McKart* v. *United States*, 395 U.S. at 195), so too in the present context, it must be adapted to the special features of this internal review machinery

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[23] The Court of Military Review, the members of which must be admitted to the bar of a federal court or the highest court of a state, is empowered to review all court-martials in which the sentence "affects a general or flag officer, or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." U.C.M.J., Art. 66(b) 10 U.S.C. 866(b). Prior to review of such court-martials, the sentence must have been approved by the convening authority, with the advice of the staff judge advocate (U.C.M.J., Arts. 64, 65(a), 10 U.S.C. 864, 865(a)). The record is then sent to The Judge Advocate General who refers it to the Court of Military Review if the sentence is within the jurisdiction of that body. See U.C.M.J., Art. 66(b), 10 U.S.C. 866(b).

[24] See U.C.M.J., Art. 67, 10 U.S.C. 867. And see discussion *infra*, pp. 42-45.

that has been set up for the military. Responsibility for maintaining order and discipline within the armed services has been vested by Congress in military tribunals; it is not a function of the civil courts. Where, as here, a serviceman chooses, "with all attendant risks, to disobey a military order to enplane for Vietnam" (App. 63), the statutory scheme calls for civilian deference to judicial review by the agency which "has a proper concern in keeping its own house in order" (*O'Callahan* v. *Parker*, *supra*, 395 U.S. at 282; Harlan, J., dissenting).

Whether or not petitioner's wilful disobedience of a lawful order of deployment (see p. 21 *supra*) can be justified on grounds of wrongful denial by the Army of conscientious objector status is, accordingly, a matter to be considered and resolved in the first instance by the military.[25] Perhaps the various tri-

[25] The present situation is to be distinguished from those cases involving servicemen who have been denied conscientious objector status by the Selective Service System, and who then submit to induction and immediately file a petition for habeas corpus to test the legality of induction. See *Eagles* v. *Samuels*, 329 U.S. 304; *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 235-236 n. 5. In such cases, the claim is that the military has no authority over the applicant due to an error by the civilian agency; recourse to the military courts is thus not required (*supra* n. 9). Here, by contrast, the assertion is that the military authorities—who concededly have jurisdiction over petitioner—erred in their application of military law. That is properly a question to be resolved in the first instance by the tribunals established exclusively to rule on military matters—especially where, as here, the issue is already pending before the military courts at the time that petitioner has finally exhausted his military administrative remedies.

bunals within the armed services can bring n
er expertise to the question of the validity
tioner's claim than can the civil courts, but
they are no less competent to pass on the fa
basis for the administrative refusal of disch
Compare *McKart* v. *United States*, *supra*, 395
at 198-199; and see *Wills* v. *United States*, 38
2d 943, 945 (C.A. 9), certiorari denied, 392
908; *Wolff* v. *Selective Service*, *supra*, 372 F.
825.[26] Permitting them first to do so does no

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[26] Petitioner contends that the Army's denial of hi
scientious objector claim presents an issue "of com
with constitutional due process standards by the m
(Pet. Br. 47, n. 15); he suggests that because he has
his claim in constitutional terms, civilian courts may in
immediately, under the authority of *Dombrowski* v.
380 U.S. 479, and succeeding cases, without regard to the com-
petence of the military tribunals to pass on the question. But
Dombrowski involved federal intervention in state prosecu-
tions brought in bad faith under an overly-broad state statute
regulating free expression. Because the activity challenged
there had a "chilling effect" on First Amendment freedoms
(380 U.S. at 486-487), and also involved harrassing tactics
that were conducted by state officials in bad faith (*Younger*
v. *Harris*, 401 U.S. 37, 50), the federal courts intervened.
Here, by contrast, we are concerned neither with an asserted
chill on First Amendment rights, nor with any evidence that
the Army has acted in bad faith (see p. 21 *supra*). See
Locks v. *Laird*, *supra*, 441 F. 2d at 480-481. The analogy to
Dombrowski and related cases is, therefore, imperfect.
Whether petitioner challenges the Army's refusal to discharge
him in terms of violating constitutional due process or, alter-
natively, as in conflict with its own regulations, the issue pre-
sented here is in the final analysis simply whether the denial
of petitioner's conscientious objector claim is without factual
basis. Resolution of that essentially fact-question (see *McGee*
v. *United States*, *supra*, 402 U.S. at 486) is well within the
competence of the military tribunals.

will be no need for civilian judicial intervention." See *Beard* v. *Stahr*, 370 U.S. 41; *In re Kelly*, *supra*. And cf. *Craycroft* v. *Ferrall*, *supra*, 408 F. 2d at 596.

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[27] A serviceman who elects to disobey the orders of his commanding officer on grounds of conscientious objection should not thereafter be permitted to delay, and perhaps avoid, court-martial proceedings by presenting his claim to the civilian courts by way of habeas corpus. As pointed out by the court below (App. 70-71): "While Parisi may honestly have disagreed [with his redeployment orders], that disagreement cannot be held to have justified his unilateral determination to defy his military superiors, not to mention the federal judges who had considered and rejected his claim. Were every soldier dissatisfied with some phase of national policy or military effort allowed to exercise similar discretion, necessary military discipline would collapse."

of exemption from combatant training and service for civilians conscientiously opposed to participation in war in any form,[28] no provision for discharge from the military of the in-service conscientious objector existed until 1962. In that year, a change in military regulations[29] permitted servicemen, whose op-

[28] See, *e.g.*, Selective Service Draft Law of 1917, 40 Stat. 76, 78; Selective Training and Service Act of 1940, 54 Stat. 885, 889; Universal Military Training and Service Act of 1948, 62 Stat. 604; Military Selective Service Act of 1967, 81 Stat. 100, 104.

[29] Department of Defense (DOD) Directive No. 1200.6 (August 21, 1962) was issued by the Secretary of Defense pursuant to his authority in 10 U.S.C. 133. Its purpose was stated as providing "uniform procedures for the ultilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection." The directive was replaced by DOD Directive

[30] The various branches of the Armed Services promulgated regulations which provided for an elaborate administrative review machinery of conscientious objector applications. The applicant is to be interviewed separately by a chaplain and psychiatrist (or medical officer), and each is to prepare a written report of the interview. He is also afforded an opportunity to appear before a hearing officer knowledgeable in policies and procedures relating to conscientious objector methods. The applicant's file is then forwarded to Departmental headquarters and reviewed by a special Conscientious Objector Review Board. See generally Army Regulation AR 635-20 (January 1, 1970); Navy Department BUPERINST 1900-5 (July 18, 1968); Air Force Regulation AFR 35-24 (March 25, 1969); Marine Corps Order MCO 1306.16B (June 18, 1969); Coast Guard COMDTINST 1900.2 (October 7, 1968).

[31] Compare, *e.g.*, *United States* v. *Dunn*, 38 C.M.R. 917, and *United States* v. *Taylor*, 37 C.M.R. 547—considering the defense to be unavailable—with, *e.g.*, *United States* v. *Quirk*, 39 C.M.R. 528, and *United States* v. *Sigmon*, C.M. 416,356 (decided January 2, 1968)—recognizing such a defense.

C.M.R. 195, and explicitly recognized the claim of wrongful administrative-refusal-of-discharge as an available defense. *Noyd* involved an officer in the Air Force who, after being denied conscientious objector status, refused to obey an order to instruct student pilots how to fly an F-100 aircraft, "a fighter plane used in Vietnam by the Air Force" (18 U.S.C.M.A. at 486, 40 C.M.R. at 198). Then Chief Judge Quinn, in an opinion concurred in by Judges Darden and Fergusen,[32] stated (18 U.S.C.M.A. at 492, 40 C.M.R. at 204):

> Obviously mindful of the conflict between the needs of the service and the plight of the conscientious objector, the regulation directs that, pending consideration of an application by the Secretary, the conscientious objector be assigned duties providing 'mimimum conflict with his professed beliefs' * * * Colonel Hansen testified he gave the accused the order to fly an F-100 instructor only after he had been informed the application for separation had been denied. The validity of the order, therefore, depended upon the validity of the Secretary's decision. * * * If the Secretary's decision was illegal, the order it generated was also illegal. * * *

On this reasoning, an attack on the lawfulness of the Secretary's action can now properly be entertained in court-martial proceedings, either on the

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[32] These three judges have been appointed to the Court of Military Appeals for terms of fifteen years, respectively. See U.C.M.J., Art. 67, 10 U.S.C. 867. Senior Judge Ferguson's term recently expired and he is presently sitting until a new judge is appointed.

ground that it is without factual basis, or that it is premised on an erroneous legal standard, or that it involves a matter outside the scope of the Secretary's authority. See *United States* v. *Goguen*, No. 421,998 (A.C.M.R., September 2, 1970), a copy of which is annexed hereto as Appendix D, *infra*, pp. 63-81.[33]

It has been made clear, however, that *Noyd* is not of unlimited scope. Where the legality of the questioned military order remains unaffected by the lawfulness of the administrative refusal of discharge—as where a soldier disobeys an order to wear his uniform—the *Noyd* defense is unavailable. See *United States* v. *Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100; *United States* v. *Goguen*, *supra*, at Appendix D infra, pp. 76-77.[34] Nor can the claim of

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[33] *Goguen* was subsequently reversed and the charges dismissed by the Court of Military Appeals (20 U.S.C.M.A. 527, 43 C.M.R. 367) on the ground that Goguen had been released from the custody of the Army pursuant to an order of discharge by the United States District Court for the District of New Jersey (*Goguen* v. *Clifford*, 304 F. Supp. 958).

[34] The military has put those claiming an in-service conscientious objection on notice that they need not perform "duty assignments" directly in conflict with their asserted beliefs while their applications for discharge are being processed through administrative channels. AR 635-20. Thus, the refusal to obey a specific "duty assignment" which is deemed to present such a conflict—whether it be to fly as an F-100 instructor or to report for noncombatant duty in Vietnam—can, consistent with announced military policy, be excused on a showing of wrongful denial of conscientious objector status. But, as a practical matter, the military cannot permit servicemen claiming discharge because of opposition to war to ignore with impunity the more general obligations of military life, such as wearing a uniform. While this require-

conscientious objection be raised in the military tribunals where no application for discharge has yet been processed through the appropriate administrative channels. *United States* v. *Avila*, 41 C.M.R. 654; *United States* v. *Kent*, *supra*, 40 C.M.R. at 405-406. And the military courts have refused to entertain the claim of wrongful refusal on a preliminary application to stay court-martial proceedings, leaving the question to be resolved at the court-martial. *Lee* v. *Peterson*, 18 U.S.C.M.A. 545, 40 C.M.R. 257.

The instant case, however, does not fall within the *Wilson*, *Avila* or *Peterson* exceptions; it is, in all material respects, essentially indistinguishable from *United States* v. *Noyd*, *supra*. Petitioner does not dispute this; instead, he points to the recent decision by the Court of Military Appeals in *United States* v.

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ment might conceivably, to some, be as repugnant to conscience as a specific duty assignment, the orderly functioning of the military necessitates compliance with such orders until actual release from military service. As stated in *Goguen* (Appendix D, *infra*, p. 76): "Obviously, it is impracticable in the military environment to permit the applicant to cast off his uniform." The claim of conscientious objection is, therefore, no defense to disobedience of a general order to wear a military uniform; the overriding need for discipline and control within military ranks puts such orders on a different footing from the order to report to a new duty assignment, such as was involved in *Noyd* and is involved here. See *United States* v. *Stewart*, 20 U.S.C.M.A. 272, 277, 43 C.M.R. 112, 119 (Quinn, C.J., concurring in part); cf. *United States* v. *Kent*, *supra*, 40 C.M.R. 404, 406; review denied, 39 C.M.R. 293. Even if petitioner had prevailed on his claim, he would have been required to wear his uniform during the short period of time that it would have taken the military to process his application for discharge; but the Army could not give a new duty assignment to someone found by the military to be entitled to discharge.

Stewart, 20 U.S.C.M.A. 272, 43 C.M.R. 112, as casting doubt on the continuing vitality of *Noyd*. Judge Dardin (now Chief Judge) wrote the opinion of the court in *Stewart*, and he appears to have adopted the view that *Noyd* should be limited to the situation where there exists a "conflict between an order given the accused while his [conscientious objector] application [is] pending [before military administrative channels] and the regulatory provision prohibiting the accused's assignment to duties inconsistent with his professed beliefs" (20 U.S.C.M.A. 276 n. 1). Even within these limits, it would seem that *Noyd* requires that petitioner's court-martial entertain the claimed defense in the present circumstances.[35]

We need not speculate about the effect of Judge Dardin's opinion on the instant case, however. Significantly, the other two members of the court expressly declined to follow his lead in this regard and reaffirmed the broader position they took in *Noyd*. Then Chief Judge Quinn declared (20 U.S.C.M.A. at 277, 43 C.M.R. at 117):

> I disagree with the repudiation of United States v. Noyd * * *. In my opinion an order by a subordinate military authority, which has its origin in, and takes its content from, an illegal action by a service Secretary is not a law-

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[35] Petitioner's argument is that his order of deployment to Vietnam, issued while his application was before the ABCMR, is in direct conflict with the regulation. Whatever the merit to that contention—and we think there is little (see n. 14 *supra*)—it is essentially no different from the claim involved in *Noyd*.

> ful order, and cannot be the foundation for a charge of disobedience of a "lawful command"
> * * *.

Because he concluded that the court-martial proceeding in *Stewart* involved only the disobedience of an order to wear a military uniform,[36] he was able to concur in the result reached by Judge Dardin—*i.e.*, that the lawfulnes of the Secretary's denial of discharge was not a question to be considered in assessing the validity of this type of military order. See *United States* v. *Goguen, supra;* and see n. 34 *supra.* Judge Ferguson, however, disagreed with the Chief Judge on this point, and, because he read the order as one of deployment for overseas duty (see n, 36 *supra*), he dissented.

To the extent, then, that *Stewart* seems to circumscribe the holding in *Noyd,* it represents the view of only one judge. The majority of the Court of Military Appeals still adheres to the position that the claim of wrongful refusal of discharge is an available affirmative defense to court-martial charges of wilful disobedience of an order of deployment to Vietnam. See *United States* v. *Larson,* 20 U.S.C.M.A. 565, 43 C.M.R. 405. And this view is shared by the Army Court of Military Review. See *United States* v. *Goguen, supra; United States* v. *May,* 41 C.M.R. 663.

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[36] Stewart was ordered to "put on your uniform to continue your movement to your overseas destination in compliance with your written overseas movement orders" (20 U.S.C.M.A. at 277, 43 C.M.R. at 117).

Moreover, as noted by the court below (App. 91 n. 12), "Parisi himself argued at his court-martial that *United States* v. *Noyd* * * * had settled that review of the basis in fact for administrative denial of a conscientious objector discharge was proper on the issue of lawfulness of the order alleged to have been disobeyed." The military judge took cognizance of the affirmative defense, examined "the entire file and the entire record" (App. 89 n. 11) and held that (App. 90-91 n. 11): "There has been no deprivation of administrative due process and I find from the examination of this record that the ruling of the Secretary of the Army was not arbitrary, capricious, unreasonable, or an abusive [*sic*] discretion." Acknowledging that use of the "arbitrary, capricious" standard "may be saying in different words that I am ruling on the basis in fact," the military judge added (App. 90 n. 11): "But I do not consider that to be —and I want the record to so reflect, so you may have an opportunity to get a definite ruling on it * * *." Of course, if a different standard has in fact been invoked,[37] that is a matter to be remedied by the Army Court of Military Review, which already has ruled "* * * that the same judicial review should be afforded in-service conscientious objection determina-

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[37] We are inclined to the view that the standard invoked in petitioner's court-martial is fundamentally no different from the "basis in fact" standard. In any event, since the "no basis in fact" test is generally considered the "narrowest known to law" (*Blalock* v. *United States*, 247 F. 2d 615, 619 (C.A. 4)), any difference is probably not to petitioner's disadvantage. Cf. *Sanford* v. *United States*, 399 F. 2d 693 (C.A. 9).

tions as are provided in the case of pre-induction decisions." *United States* v. *Goguen*, *supra*, Appendix D, *infra*, p. 75.[38]

At all events, it seems clear that the affirmative defense of wrongful refusal of discharge is one that the military tribunals will entertain when reviewing the type of order that is involved here; petitioner's own court-martial is an example. It is, therefore, entirely proper to require him to pursue his available remedies in that forum before allowing him access to the civil courts to litigate the lawfulness of the Secretary's denial of his conscientious objector application.[39] See *In re Kelly*, *supra*; *Locks* v. *Laird*, *supra*;

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[38] The Court of Military Review "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." U.C.M.J., Art. 66 (c), 10 U.S.C. 866(c).

[39] Petitioner suggests that because it is possible for the Court of Military Review to acquit him on separate grounds, without reaching the question of the lawfulness of the Secretary's disapproval, he should not be required to exhaust. While such a contingency cannot be completely discounted, it seems exceedingly remote in the present case—the only other unrelated grounds asserted by petitioner before the military tribunal are (1) that he was denied due process because he was represented by military, rather than civilian, counsel at the Article 32 pretrial investigation (10 U.S.C. 832), and (2) that he was improperly ordered overseas without first being given a two-hour "orientation" briefing (a requirement that once existed under Army Regulation 612-35, but had been suspended prior to petitioner's orders by a superseding regulation, AR 612-2 (October 1, 1969); see *Drifka* v. *Brainard*,

Thompson v. *Wetherill*, W.D. Okla., Civ. No. 70-167, decided April 21, 1970; and cf. *McFadden* v. *Selective Service System*, 415 F. 2d 1140, 1141 (C.A. 9).

2. Nor is it accurate to suggest that the military is powerless to order petitioner's discharge if its courts should ultimately acquit him of the pending court-martial charges on the ground that the Secretary's disapproval was without basis in fact. Such a ruling by the military tribunals amounts to a determination that petitioner is entitled to separation from the Army as a conscientious objector. It is *res judicata* between the individual and the Army. Thus, the Secretary "has no practical alternative except to discharge the member." *United States* v. *Stewart*, *supra*, 20 U.S.C.M.A. at 276. In such circumstances, the Adjutant General of the Army is required by regulation (AR 635-200) to follow the same procedures that apply when "[t]he discharge or release of an individual from the Army [is] ordered by a U.S. Court or judge thereof." See Appendix A, *infra*, p. 58. Specifically, upon proper notification he is to "* * * take appropriate action to direct the discharge, release from active military service, or re-

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294 F. Supp. 425 (W.D. Wash)). In any event, petitioner should not now be permitted to deprive the Court of Military Review of the opportunity to pass on the questions relating to his conscientious objector claim merely because he has raised additional issues in that court. As this Court observed in *Gusik* v. *Schilder*, *supra*, 340 U.S. at 133, if resort to the military tribunals does ultimately prove to be "futile," "[h]abeas corpus will then be available to test any questions of jurisdiction which petitioner may offer."

lease from military control of the individual concerned" (*ibid.*).

Moreover, petitioner has an available remedy by way of habeas corpus in the Court of Military Appeals. It is, of course, upon this court, comprised solely of civilian judges (U.C.M.J., Art. 67, 10 U.S.C. 867), that Congresss has conferred "a general supervisory power over the administration of military justice." *Gale* v. *United States*, *supra*, 17 U.S.C.M.A. at 42, 37 C.M.R. at 306. Its "delicate perceptions," it has been said, "have sniffed out fatal denials of due process in situations in which their presence would probably not have been noticed by most civilian judges." Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 Colum.L.Rev. 40, 57 n. 87 (1961).[40] Endowed by Congress with appellate jurisdiction over military criminal proceedings (U.C.M.J., Art. 67, 10 U.S.C. 867), the Court of Military Appeals also claims "incidental powers" (*In re Taylor*, 12 U.S.C.M.A. 427, 430, 31 C.M.R. 13, 16) that enable it to "[mold] military practice by way of adjudication" (*United States* v. *Rinehart*, 8 U.S.C.M.A. 402, 409, 24 C.M.R. 212, 216) in appropriate circumstances. See *Gale* v. *United States*, *supra*, 17 U.S.C.M.A. at 42, 37 C.M.R. at 306.

It now seems well settled that this military court has ample power under the All Writs Act, 28 U.S.C. 1651(a), to issue an emergency writ of habeas cor-

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[40] See also Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 189 (1962).

pus in cases, like the present one, which are subject to its jurisdiction. See, *e.g.*, *Noyd* v. *Bond*, *supra*, 395 U.S. at 695; *United States* v. *Augenblick*, *supra*, 393 U.S. at 350.[41] Its ability to do so as a function of its responsibility for "the protection and preservation of the Constitutional rights of persons in the armed forces" was explicitly recognized in *United States* v. *Frischholz*, 16 U.S.C.M.A. 150, 152, 36 C.M.R. 306, 308. As the Court of Military Appeals stated more recently in *United States* v. *Bevilacqua*, 18 U.S.C.M.A. 10, 12, 39 C.M.R. 10, 12, "an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary." See also *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399. Accordingly, on numerous occasions, this tribunal has entertained habeas corpus applications by servicemen seeking release from military confinement (see, *e.g.*, *Dale* v. *United States*, 19 U.S.C.M.A. 254, 41 C.M.R. 254; *Horner* v. *Resor*, 19 U.S.C.M.A. 285, 41 C.M.R. 285; *United States* v. *Bevilacqua*, *supra*; *Levy* v. *Resor*, *supra*), and it has not hesitated to grant the relief requested where it deemed such action to be appropriate (see, *e.g.*, *United States* v. *Jennings*, 19 U.S.C.M.A. 88; 41 C.M.R. 88; *Johnson* v. *United States*, 19 U.S.C.M.A. 407, 42 C.M.R. 9).

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[41] The Court of Military Appeals has jurisdiction to review all cases reviewed by a board of review "which the Judge Advocate General orders sent to the Court of Military Appeals for review" (U.C.M.J., Art. 67(b)(2), 10 U.S.C. 867(b)(2)) or "in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted review" (U.C.M.J., Art. 67(b)(3), 10 U.S.C. 867(b)(3).

Admittedly, most of the cases in which the highest military tribunal has been called upon to exercise its extraordinary power under the All Writs Act have involved servicemen seeking release from confinement within the military pending appeal from court-martial conviction. See, *e.g.*, *Noyd* v. *Bond*, *supra*, 395 U.S. at 695. The Court of Military Appeals has not yet had occasion to speak to the question whether its habeas corpus jurisdiction also permits issuance of the writ in favor of a serviceman concededly entitled to discharge from the military as a conscientious objector.[42] It has, however, discussed its power to grant extraordinary relief in broad terms in "cases in which [it has] jurisdiction to hear appeals or * * * to which [its] jurisdiction may extend when a sentence is finally adjudged and approved." *United States* v. *Snyder*, 18 U.S.C.M.A. 480, 482, 40 C.M.R. 192, 195; *United States* v. *Bevilacqua*, *supra*, 18 U.S.C.M.A. at 11, 39 C.M.R. at 11. While it has emphasized that "resort to extraordinary [remedies such as those available] under the All Writs Act * * * cannot serve to enlarge [its] power to review cases," the court has hastened to add that habeas corpus relief is appropriate "to aid [it] in the exercise of the authority [it] already has." *United States* v. *Snyder*, *supra*, 18 U.S.C.M.A. at 483, 40 C.M.R. at 195.

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[42] We are advised by the Department of the Army that recourse to the Court of Military Appeals for habeas corpus relief in such circumstances has not been necessary, since upon a determination of lack of jurisdiction by a military tribunal the serviceman is administratively discharged pursuant to Army Regulation AR 635-200. Cf. *United States* v. *May*, 41 C.M.R. 663.

Consequently, where a military court over which the Court of Military Appeals concededly has jurisdiction, or the Court of Military Appeals itself, determines that a serviceman has been wrongfully denied discharge as a conscientious objector, there seems every reason to assume that the highest military tribunal will entertain a habeas corpus petition seeking to effectuate that discharge as a legitimate exercise of its "supervisory power over the administration of military justice." *Gale* v. *United States*, *supra*, 17 U.S.C.M.A. at 42, 37 C.M.R. at 306.[43] It does not thereby enlarge its authority to review cases; in such circumstances the issue whether the Secretary's disapproval of the application has factual basis has already been considered and resolved by the military courts. Rather, resort by the Court of Military Appeals to its power under the All Writs Act, in order to afford the relief to which the applicant is clearly entitled, serves in a very real sense to aid the court in the exercise of its jurisdiction. It is both "incidental to, and protective of, those [powers] defined in Article 67." *United States* v. *Bevilacqua*, *supra*, 18 U.S.C.M.A. at 11, 39 C.M.R. at 11.

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[43] This seems implicit in *Mueller* v. *Brown*, *supra*. There, the Court of Military Appeals declined to entertain a habeas corpus application for discharge, premising its decision solely on the ground that the applicant had not yet litigated his claim in court-martial proceedings (see n. 17 *supra*). The clear implication is that where such claim has been scrutinized by military tribunals in cases falling within the jurisdiction of the highest military court, a habeas corpus application for release from the Army can properly be entertained.

The slim possibility that the Court of Military Appeals might not entertain habeas corpus jurisdiction if petitioner should ultimately prevail on the merits of his claim is not sufficient basis for relaxing the exhaustion requirement. *Gusik* v. *Schilder*, *supra*, 340 U.S. at 133. As this Court stated in *Gusik*, *supra*: "If [that] proves to be, no rights have been sacrificed. Habeas corpus will then be available to test any question of jurisdiction which petitioner may offer." [44]

D. The Factor of Delay

By deferring to the military tribunals before whom the "basis in fact" question is already pending, civil courts do not foreclose the habeas corpus applicant from ever subjecting his claim to civilian scrutiny. Compare *McKart* v. *United States*, *supra*, 395 U.S.

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[44] Moreover, whether or not habeas corpus relief is available in the Court of Military Appeals may well be an academic question in the circumstances of this case. The district court has retained jurisdiction; it stayed the proceedings "until there has been trial and a final judgment in the military courts on the court martial charges presently pending against petitioner" (App. 53). Thus, if petitioner should be acquitted by the Court of Military Review on grounds that the denial of his conscientious objector application was without basis in fact, he could immediately gain access to the district court to seek discharge from service; he would not first be required to request extraordinary relief from the Court of Military Appeals. No longer would recourse to the civil courts interrupt the military judicial process, interfere with military discipline, or deprive the military of an opportunity to correct its own errors. Exhaustion of remaining military remedies would thus serve no overriding purpose and need not be required.

at 197; *McGee* v. *United States*, *supra*, 402 U.S. at 489. The effect of an application of the exhaustion doctrine in the present context is, instead, merely to delay consideration by the federal courts until it becomes clear that a final determination of the issues has been made within the military judicial system and a live controversy still remains. See *Noyd* v. *Bond*, *supra*, 395 U.S. at 696; *Gusik* v. *Schilder*, *supra*, 340 U.S. at 131-132.

Petitioner contends that such delay is an unduly harsh condition to impose on servicemen seeking discharge as conscientious objectors, since it forces them to continue serving in the armed services, pending final resolution of court-martial proceedings, contrary to their professed religious opposition to war in any form. It must be remembered, however, that we are dealing here not with a person who holds such beliefs at the time he is called upon to serve, and thus disputes from the outset the military's jurisdiction over him (*supra* n. 25). Rather, petitioner voluntarily submitted to induction and willingly surrendered to the discipline and control that is an essential element of military life. If, nine months later, he declares that the commands of his conscience have changed so that they are no longer compatable with his duty assignment or the exigencies of service, that alone does not entitle him to separation from the Army or excuse him from the obligation to obey military orders.

The Secretary of Defense has promulgated a directive (DOD Directive No. 1300.6) which specifies the conditions on which conscientious objectors shall

be eligible for discharge. Those in the service who profess opposition to war in any form can no more claim separation as a matter of constitutional right than can civilian conscientious objectors seeking an exemption under statute (50 U.S.C. App. (1964 ed.) 456(j)). See, *e.g.*, *United States* v. *MacIntosh*, 283 U.S. 605, 623-624; *Hamilton* v. *Regents*, 293 U.S. 245, 264; *In re Sommers*, 325 U.S. 561; *Welsh* v. *United States*, 398 U.S. 333, 356 (Harlan, J., concurring). Discharge is a matter of regulatory grace,[45] and is afforded only to those members of the armed forces who can demonstrate satisfactorily that their opposition is general and not particular (*Gillette* v. *United States*, 401 U.S. 437), is rooted in conscience and religion (*Welsh* v. *United States*, 398 U.S. 333), is sincerely held (*Witmer* v. *United States*, 348 U.S. 375, 381),[46] and "did not become fixed until entry into service" (DOD Directive 1300.6, para. IV(B)(2).).

Petitioner was unable to convince the Secretary of the Army and ABCMR that he qualified under the relevant criteria. Whether or not that determina-

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[45] DOD Directive No. 1300.6 (May 10, 1968), para. IV (B)(1) states: "No vested right exists for any person to be discharged from military Service at his own request even for conscientious objection before the expiration of his term of service, whether he is serving voluntarily or involuntarily." And see Army Regulation AR 135-25.

[46] As this Court stated in *Gillette* (401 U.S. at 442), "* * * the standards for measuring claims of in-service objectors * * * are the same as the statutory tests applicable in a pre-induction situation." And see DOD Directive No. 1300.6, para. IV (B)(3)(b); see also AR 635-20, para. 3b.

tion should be sustained—a question which plainly cannot, and should not, be answered on the present record—petitioner remained, of course, subject to the discipline and control of the Army. In order to assure the minimum possible conflict between his asserted beliefs and his continuing obligation to serve, the district court restrained the Army from assigning him "to any duties which require materially greater participation in combat activities or combat training than is required in his present duties" (App. 30). The order to report to noncombatant duty in Vietnam complied with the court's mandate. As Mr. Justice Douglas observed in denying petitioner's application for stay of deployment (App. 36; 396 U.S. at 1234): "It would seem offhand that 'psychological counseling' in Vietnam would be no different than 'psychological counseling' in army posts here."

Having deliberately elected to defy that order, petitioner is now in no position to complain of the delay occasioned by permitting the military to prosecute him for such disobedience. As the court below aptly stated (App. 70-71):

> We are not blind to the possible moral dilemma that Parisi faced. We cannot quarrel with the proposition that disobedience based on the dictates of religious conscience is based on "an obligation, superior to that due the state, of not participating in way [*sic*] in any form." *United States* v. *Seeger*, 380 U.S. 163, 172, * * *. However, the District Court's injunction was reasonable and afforded ample protection for Parisi's religious scruples. Three [*sic*] judges of our

> court and our Circuit Justice found that the military order for Parisi's redeployment did not, in the circumstances, violate the District Court's protective order. While Parisi may honestly have disagreed, that disagreement cannot be held to have justified his unilateral determination to defy his military superiors, not to mention the federal judges who had considered and rejected his claim. Were every soldier dissatisfied with some phase of national policy or military effort allowed to exercise [the same] discretion, necessary military discipline would collapse. Had Parisi bided his time it appears, on the record before us now, that he likely would have obtained the relief he sought from the District Court. If the fruits of his impatience are bitter, he has only himself to blame for production.

Moreover, the delay of which petitioner now complains is substantially of his own making. The order of the district court that is presently being contested was issued on March 31, 1970 (App. 55). Approximately one week later, on April 8, 1970, petitioner was found guilty of the court-martial charges against him, and "[t]he record of trial [was] forwarded to The Judge Advocate General of the Army for review by a Court of Military Review" on July 2, 1970 (App. 59). In the normal course of events, the reviewing court would in all probability have rendered its decision before now. Petitioner, however, through no less than seven requests for "enlargement of time," postponed filing his brief with the Court of Military Review until April 27, 1971, some nine months later. The respondents' reply brief was filed on August 2,

1971. We are advised that on September 14, 1971, petitioner's counsel informed the military court that he did not desire oral argument;[47] the court has not yet acted on the case. In these circumstances, petitioner's objection to an application of the exhaustion doctrine on the ground of "unconscionable delays" (Pet. 58) is not well taken.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT C. MARDIAN,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

ROBERT L. KEUCH,
ROBERT A. CRANDALL,
Attorneys.

SEPTEMBER 1971.

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[47] Petitioner's counsel in the present proceedings before this Court do not represent him in the proceedings before the military tribunals.

APPENDIX A

1. Article 66 of the Uniform Code of Military Justice, 10 U.S.C. 866, provides in relevant part:

> (a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each panel shall be composed of not less than three appellate military judges. * * * Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. * * *
>
> (b) The Judge Advocate General shall refer to a Court of Military Review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.
>
> (c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines on the basis of the entire record, shall be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.
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> * * * *

2. Article 67 of the Uniform Code of Military Justice, 10 U.S.C. 867, provides in relevant part:

(a) (1) There is a United States Court of Military Appeals established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense. The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. * * * Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of a State * * *.

* * * *

(b) The Court of Military Appeals shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Military Review, affects a general or flag officer or extends to death;

(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

* * * *

(d) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the con-

vening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

* * * *

3. The All Writs Act, 28 U.S.C. 1651(a) provides:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * * *

4. Department of Defense Directive No. 1300.6 (May 10, 1968) provides in relevant part:

IV. Policy

* * * *

B. *DoD Policy.*—Consistent with this national policy, bona fide conscientious objection as set forth in this Directive by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized. This policy will be executed subject to the following:

1. No vested right exists for any person to be discharged from military Service at his own request even for conscientious objection before the expiration of his term of service, whether he

is serving voluntarily or involuntarily. Administrative discharge prior to the completion of an obligated term of service is discretionary with the military Service concerned, based on judgment of the facts and circumstances in the case.

2. A request for discharge after entering military Service based solely on conscientious objection which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained. This accords with Federal court holdings that a claim to exemption from military Service under the Selective Service laws must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

* * * *

[3] b. Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining 1-O or 1-A-O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service. [footnote omitted.]

* * * *

VI. Procedures

* * * * *

[B] 2. Pending decision on the case and to the extent practicable the person will be employed in duties which involve the minimum conflict with asserted beliefs. This paragraph shall not be applicable where repeat applications are filed by an individual based upon substantially the same supporting information.

* * * * *

E. Determination by the Military Department, in accordance with the facts of the case and the guidelines furnished herein, shall be final with respect to the administrative separation of its members.

* * * * *

5. Army Regulation AR 635-20 (August 15, 1970) provides in relevant part:

[3] b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered. Requests for discharge after entering military service will not be favorably considered when—

(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

(3) Based solely upon considerations of policy, pragmatism or expediency.

(4) Based on objection to a particular war.

* * * *

6. Utilization, assignment and training of applicants for discharge as conscientious objectors.

a. Except as provided in b below, individuals who have submitted formal applicants (para. 4a) for discharge based on conscientious objection will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications. In the case of trainees, this means that they will not be required to train in the study, use, or handling of arms or weapons. It does not preclude the trainees from participating in those aspects of training that do not involve the bearing or use of arms, weapons, or munitions. Except for this restriction, conscientious objector applicants are subject to all regulations to include those on training.

* * * *

d. When a request for discharge has been denied, individual will comply with reassignment orders, be assigned to any duties, or be required to participate in any type of training. Application to the Army Board for Correction of Military Records has no effect on such reassignment, performance of any duties, or participation in any type of training.

* * *

6. Army Regulation AR 635-200 (June 12, 1968) provides in relevant part:

> 5-12. Lack of Jurisdiction. The discharge or release of an individual from the Army may be ordered by a U.S. Court or judge thereof. The officer upon whom such an order or writ is served will report immediately to The Judge Advocate General, as directed by MCM 1951, paragraph 217, and AR 27-5, and will notify The Adjutant General, Department of the Army, ATTN: AGPO-SS, Washington, D. C., who will take appropriate action to direct the discharge, release from active military service, or release from military control of the individual concerned. * * * Authority (AR 635-200) and SPN 316 for separation will be included in directives or orders directing individuals to report to the appropriate transfer activity or unit personnel section designated to accomplish transfer, processing for discharge, or release from active duty, as appropriate. Similar action will be taken upon the final judicial determination of a convening authority of a general or special court-martial, a law officer, a president of a special court-martial, or military appellate agency that an individual is not currently a member of the Army.

APPENDIX B

DEPARTMENT OF THE ARMY
Office of the Adjutant General
Washington, D. C. 20318

AGPE-RP Parisi, Joseph
048 34 0713, US52726468 (24 Nov 69)

2 Mar 1970

PFC Joseph Parisi, 048 34 0713
Hospital Company
U. S. Army Hospital
Fort Ord, California 93941

Dear Private Parisi:

I have been requested by the Army Board for Correction of Military Records to make further reply to your request for correction of your Army records.

The administrative procedures established by the Secretary of the Army for the guidance of the Army Board for Correction of Military Records provide that the Board may deny an application where a sufficient basis for a review has not been established.

Following examination and consideration of your Army records together with such facts as presented by you, the Army Board for Correction of Military Records on 11 February 1970 determined that insufficient evidence has been presented to indicate probable material error or injustice. Accordingly, your application was denied.

In the absence of new and material evidence tending to show the existence of error or injustice in the

military records, further consideration by the Board is not contemplated.

Sincerely,

KENNETH G. WICKHAM

KENNETH G. WICKHAM
Major General, USA
The Adjutant General

CF
Mr. Dick Goff
44 Montgomery St.
San Francisco, CA 94104

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D.C. 20530, October 23, 1969.

Memo. No. 652

To All United States Attorneys.

Re: Habeas Corpus Relief of Servicemen Denied Discharge as Conscientious Objectors.

After consultation with the Department of Defense the following policy respecting review of denials of release sought under Department of Defense Directive 1300.6 has been adopted effective immediately:

1. EXHAUSTION OF MILITARY JUDICIAL REMEDIES

If court-martial charges have not been preferred, a serviceman need not commit an offense and exhaust military judicial remedies as a prerequisite to relief by way of habeas corpus proceedings in the District Courts. However, if court-martial charges have been preferred military judicial remedies must be exhausted before resort to the civil courts. The Government acquiesces in the decisions in *In re Kelly*, 401 F. 2d 211 (5th Cir. 1968) and *Hammond* v. *Lenfest*, 398 F. 2d 705 (2d Cir. 1968) and will no longer urge the position taken in *Noyd* v. *McNamara*, 378 F. 2d 538 (10th Cir. 1967).

2. EXHAUSTION OF MILITARY ADMINISTRATIVE REMEDIES

The decision of the Military will be deemed ripe for judicial review upon the final action of the Adjutant General of the Army, the Chief of the Bureau

of Naval Personnel, the Adjutant General of the Air Force or the Commandant of the Coast Guard. Application to the Army and Air Force Boards for the Correction of Military Records will remain an available procedure but will not be insisted upon by the Government as a precondition to judicial review. The Board for the Correction of Naval Records adheres to its policy of rejecting applications for want of jurisdiction.

3. The instructions set forth in the United States Attorneys Bulletin, Vol. 17, No. 23, pp. 613-14, to the extent that they are inconsistent with the foregoing, are revoked.

WILL WILSON,
Assistant Attorney General, Criminal Division.

APPENDIX D

UNITED STATES ARMY COURT OF MILITARY REVIEW
Washington, D. C. 20315

Before
KELSO, NEMROW and TAYLOR
Military Appellate Judges

[Dated, Entered and Filed Clerk of Court US Army Court of Military Review]

2 Sep 1970

CM 421998

UNITED STATES

v.

Private (E-1) PHILIP W. GOGUEN, 026-32-0676, U. S. Army, Special Processing Detachment, Special Troops, US Army Training Center, Infantry, Fort Dix, New Jersey

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General Court-Martial Convened by Headquarters US Army Training Center, Infantry and Fort Dix, Fort Dix, New Jersey (T. J. Nichols, Military Judge)

Sentence adjudged 27 August 1969 Approved sentence: Bad-conduct discharge, confinement at hard labor for six months, and forfeiture of $100.00 per month for six months.

Appellate Counsel for the Accused:

CPT Libero Marinelli, Jr., JAGC
CPT Bernard J. Casey, JAGC
LTC Charles W. Schiesser, JAGC

Appellate Counsel for the United States:

CPT John C. Lenahan, JAGC
CPT Benjamin G. Porter, JAGC
COL David T. Bryant, JAGC

OPINION OF THE COURT

TAYLOR, Judge:

Contrary to his pleas, the appellant was convicted, on 4 June 1969, by a general court-martial, of an unauthorized absence for a period of about 18 days (Charge II) and of disobeying the order of a superior commissioned officer to put on a proper military uniform (Charge I) in violation of Articles 86 and 90, Uniform Code of Military Justice (UCMJ), 10 USC §§ 886 and 890, respectively. He was sentenced to a bad-conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor for 12 months. The convening authority approved the finding of guilty but, because of an instructional error at trial, set aside the sentence and ordered a rehearing thereon. The rehearing on sentence was held on 27 August 1969, and the appellant was sentenced, by a military judge sitting alone as a general court-martial, to a bad-conduct discharge, forfeiture of $100.00 pay per month for six months, and confinement at hard labor for six months. The same person who served as law officer [hereafter referred to as military judge] at the original trial was the military

judge at the rehearing on sentence.[1] On 17 October 1969, the convening authority approved the sentence adjudged at the rehearing.

On 14 October 1969, the United States District Court for the District of New Jersey granted a petition for writ of habeas corpus and ordered that the appellant be discharged from the custody of the Army.[2] In compliance therewith, he was released from custody and control of the United States Army on 27 October 1969.[3]

Appellate defense counsel assign the following errors:

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[1] Effective 1 August 1969, the UCMJ was amended by the Military Justice Act of 1968, 82 Stat. 1335 (1968). Before the amendment the trial judge at a court-martial bore the title of law officer. Under the Act, the title was changed to military judge. The Act also provided that a court-martial could consist of only a military judge if requested by an accused. See Article 16, UCMJ, 10 USC § 816.

[2] Goguen v. Clifford, et al., 304 F. Supp. 958 (D. N.J. 1969). The district court held that the sole test for discharge on the basis of conscientious objection is the sincerity of the objector's belief that war is wrong. Subsequently, the Supreme Court in United States v. Welsh, 90 S.Ct. 1792 (1970), indicated that this is not a correct statement of the law.

[3] SO No. 300, Headquarters, U.S. Army Training Center, Infantry and Fort Dix, New Jersey, dated 27 October 1969, as amended by SO No. 337, that headquarters, dated 3 December 1969.

I

Erroneous Disposition By the Secretary of the Army of An Application for Discharge Under the Provisions of AR 635-20 Through Employment of Incorrect Decisional Standards Is a Defense To a Charge of Subsequently Disobeying An Order Conflicting With the Conscientious Objection Beliefs Providing Basis for the Application.

A. The Decision of the United States District Court of New Jersey That the Appellant Is a Conscientious Objector Entitled to Discharge Under the Provisions of AR 635-20 and That the Secretary of the Army Improperly Denied the Appellant's Application for Such Discharge Through Employment of An Incorrect Decisional Standard Is *Res Judicata* and Binding Upon the Military Judicial System.

B. The Military Judge's Refusal, Based on His Notion That the Court-Martial Was Without Jurisdiction To Review the Correctness of the Secretary of the Army's Decision on the Appellant's Application for Discharge Under the Provisions of AR 635-20, To Allow Litigation of the Propriety of That Decision Was Prejudicial Error.

II

The Evidence Presented At Trial Is Insufficient As a Matter of Law To Prove Beyond a Reasonable Doubt That the Order in Question Was Not Given Solely for the Purpose of Increasing Punishment.

III

The Military Judge in Recommending That the Secretary of the Army At a Later Date Substitute An Administrative Discharge for the Bad Conduct Discharge Which He Adjudged As Part of the Sentence Impeached the Appropriateness of the Punitive Discharge Portion of the Sentence.

Assigned Errors IA and II are without merit and do not warrant discussion.

At the original trial of this case, the defense moved to dismiss the disobedience charge on the ground that the order given to the accused was unlawful because there was no basis in fact for the finding by the Department of the Army that the accused was not a religious, conscientious objector and entitled to separation as such. The military judge denied the motion on the basis that he was not empowered "to review the administrative determination connected with" a "conscientious objector application."

The record indicates that the appellant filed a first application for discharge as a conscientious objector on 29 January 1968. The application was disapproved by the Secretary of the Army on 10 June 1968. The reason for disapproval was expressed as:

> "Not based upon religious training or belief but upon personal philosophical views."

At the time of trial, the administrative record of that application was in evidence before the United States District Court in connection with the appellant's petition for writ of habeas corpus. The defense counsel expressed a desire to present it in evidence at the court-martial. The military judge ruled that the court was not empowered to rule on "any question of

fact, law, or mixed law and fact" connected with "the administrative determination." He also stated that he would rule that the file was inadmissible if it was offered in evidence as a defensive matter on the merits. He further advised that it might later be admissible as a mitigating factor during the sentencing portion of the trial. Since the file was never offered in evidence, it is not contained in the record of trial and the facts discussed in this opinion are not taken therefrom.

Although the motion to dismiss was denied and conscientious objection was not allowed as a defense, some evidence of the issue was interjected into the original trial.

In July 1968, the appellant submitted a second application which asserted that new evidence was attached. This application was marked as a defense exhibit for identification and offered in evidence both on the merits and after findings. Although admission into evidence was rejected in each instance, the file, having been marked for identification, is attached to the record.[4] On 24 September 1968, the second application was returned to the appellant by Headquarters First United States Army, without action, in accordance with paragraph 5, AR 635-20, 17 August 1968, because the evidence in the second application was not so substantially different from that in the first as to warrant favorable consideration. Apparently, some later action was taken on this application since it was not until 14 February 1969 that the unit commander advised the appellant that his application had been finally disapproved and that he would be reassigned

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[4] At the rehearing on sentence, the military judge indicated that he would consider all matters contained in the record of the original trial.

to another unit to complete basic training. At the time of rendering this advice, the unit commander noticed that the appellant was wearing civilian clothes and issued the order for the appellant to don a uniform. The unit commander testified that before this time the appellant had always been dressed in an appropriate uniform. The appellant testified that he had not been wearing a uniform for two days prior to this encounter. Pending final action on his application, the appellant had been assigned to limited duties that did not conflict with his asserted beliefs, primarily clerical duties, but had not been excused from wearing a uniform.

Immediately after sentencing the appellant at the rehearing the military judge stated:

> "As to your conscientious objector assertions, I think the record is clear from the original hearing that I did not think that this court has the right or authority to redetermine the administrative correctness of the administrative decision concerning your claim. And I certainly adhere to that. So that from the legal standpoint the claim was denied and I cannot really condone any self-help in this area. And I must say this matter has been recognized fairly recently by the Court of Military Appeals. On the other hand, as an individual, I must say that had I been in a position to assess your claim of conscientious objection, I believe that I would have granted that request and it is for this raeson that, even though I believe that a bad conduct discharge is appropriate to the offenses under all the circumstances and it is for this reason I have adjudged it, at the same time I shall, and I do recommend that ultimately the Secretary of the Army substitute an administrative form of discharge.

"And finally, just to make myself clear, my expressed disagreement with the administrative determination as to your conscientious objection status is on the facts, it is not any belief on my part that there was any arbitrariness or failure to consider all the matters which I believe has been taken up by you in other proceedings in the federal district court."

In Assigned Error IB, appellate defense counsel urge this Court to hold that military judges are empowered to rule on the "correctness" and "propriety" of decisions by the Secretary of the Army to disapprove requests for discharge that are based on conscientious objection to participation in war. We cannot agree. In our opinion, the military judge was correct in his post-sentence pronouncement that he was not empowered to overrule the Secretary's determination simply because he disagreed therewith under the facts. However, United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969), decided after the original trial, clearly establishes that the military judge misconstrued his powers concerning his authority to act on the motion to dismiss. For the purpose of future guidance, we feel it necessary to express our views on this subject.

In *Noyd*, a case very similar to that of this appellant, the United States Court of Military Appeals held that military judges are empowered to rule on the *legality* of the Secretarial decision where the validity of a subsequent order *depends* upon that decision. In *Noyd*, the accused, like this appellant, was convicted of disobeying the order of a superior commissioned officer that was issued shortly after he was notified that his application for discharge as a conscientious objector had been disapproved. However, unlike this appellant, Noyd was convicted of disobey-

ing an order to perform a particular military task, that is, "to fly as a F-100 instructor." He had not been required to perform this duty pending final action on his application for discharge. The portion of the *Noyd* opinion which we consider critical to our discussion of this case is quoted below:

> "For reasons which can be readily imagined, but need not be recited, the Department of Defense determined to help the serviceman who, while in service, developed conscientious scruples against bearing arms or participating in the military mission. The Secretary of Defense promulgated a directive to authorize separation of conscientious objectors. Department of Defense Directive, No. 1300.6, August 21, 1962, revised May 10, 1968. [Footnote omitted.] This directive was effectuated in the Air Force by the provisions of AFR 35-24, March 8, 1963. Paragraph 3 of the regulation in effect at the time of the accused's application provided as follows: 'Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standards.'
>
> "According to appellate defense counsel, the Secretary of the Air Force erroneously assumed the regulation included the conscientious objector opposed to all war, but excluded the selective objector opposed to an 'unjust' war such as the Vietnam conflict. They further contend that this mistaken assumption led the Secretary to deny the accused's application for separation from the service. The Government maintains that, even if wrong as a matter of law, the Secretary's ruling 'had absolutely nothing to do with the order the accused chose to disobey.' The evidence is contrary to the Government's contention.

"Obviously mindful of the conflict between the needs of the service and the plight of the conscientious objector, the regulation directs that, pending consideration of an application by the Secretary, the conscientious objector be assigned duties providing 'minimum conflict with his professed beliefs.' AFR 35-24, paragraph 7. Colonel Hansen testified he gave the accused the order to fly as an F-100 instructor only after he had been informed the application for separation had been denied. The validity of the order, therefore, depended upon the validity of the Secretary's decision in much the same way the order to the accused in the *Voorhees* case depended upon the validity of the Army's regulation on review of manuscripts by service persons which were intended for civilian publication. If the Secretary's decision was illegal, the order it generated was also illegal. See United States v. Gentle, 16 USCMA 437, 37 CMR 57." *Id.* at 491-492, 40 CMR at 203-204.

The Court carefully pointed out in *Noyd* that conscientious objection in and of itself is not a defense to disobedience of an order by stating:

"Fundamental to an effective armed force is the obligation of obedience to lawful orders. The obligation to obey a lawful order cannot be, and is not, as a matter of law, terminated on the mere occurrence of a condition or circumstance that might justify separation from the service. On the contrary, the obligation to obey continues until the individual is actually discharged in accordance with the provisions of law." Id. at 491, 40 CMR at 203.

The later opinion in United States v. Wilson, 19 USCMA 100, 41 CMR 100 (1969), reiterates this proposition by indicating that:

> "*If the command was lawful*, the dictates of accused's conscience, religion, or personal philosophy could not justify or excuse disobedience." (Emphasis added.)[5]

Our opinion does not in any way alter that rule of law.

In considering the power of the military judge to entertain a motion of the type involved in this case, we must ascertain what constitutes an "illegal" decision of a Secretary of a military department. In our opinion, *Noyd* holds that such decisions are illegal if the Secretary of the military department in reaching his decision:

(1) *Erroneously construed the standard provided in applicable regulations.* This was the defense assertion in *Noyd.*

(2) *Applied a standard which is inconsistent with standards provided by the Secretary of Defense or the President.* This is made clear in *Noyd* by the discussion of United States

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[5] This court has previously expressed concern that the holdings in *Noyd* and *Wilson* may be inconsistent. See *United States* v. *Avila*, —— CMR —— (ACMR 1970) en banc opinion). However, *Wilson* is distinguishable from *Noyd* in that the defense in *Wilson* did not contest the legality of the disapproval of the accused's application by the Secretary but merely defended on the basis of conscientious objection. *Avila* also held that conscientious objection in and of itself is not a defense to disobedience of orders. The four appellants in *Avila* had not submitted applications for discharge as conscientious objectors at the time of the alleged disobedience.

v. Voorhees, 4 USCMA 509, 16 CMR 83 (1954).

(3) *Was acting on a matter which he was not authorized to decide.* See United States v. Gentle, 16 USCMA 437, 37 CMR 57 (1966), which is cited in *Noyd.*

Our study of Department of Defense Directive 1300.6, 10 May 1968, particularly paragraphs IVB3 and V thereof, satisfies us that it establishes a requirement that the military departments may not disapprove a conscientious objector application unless there is a basis in fact for so doing. Thus, if an application is disapproved without any basis in fact by a military department, it constitutes an illegal decision under (2), in the above paragraph. The directive of the Secretary of Defense (para IVB3b) also expresses a desire that claims of conscientious objection made after entry into the military service be judged by the same standards that are applied when such claims are asserted before induction. Regarding judicial review of conscientious objection decisions made before induction, Congress provided as follows in section 10(b)(3), Military Selective Service Act of 1967, 50 USC App § 460(b)(3) (1964), *as amended* (Supp V, 1970):

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under Section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the ques-

tion of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." [6]

Therefore, as to those applications which may be entertained,[7] we conclude that the same judicial review should be afforded in-service conscientious objection determinations as are provided in the case of pre-induction decisions. However, we hasten to point out that the review is very strictly limited. It is restricted to reviewing only the application file that was considered by the Secretary and to determining whether that file contains any evidence to support the disapproval by the Secretary. The military judge is not empowered to conduct a trial *de novo* or to consider new evidence. See Shaw, *Selective Service Litigation and the 1967 Statute*, 48 Military Law Review 33, 62-70 (1970), and the authorities cited therein.

Since the trial defense counsel asserted in the motion to dismiss that it was contended that there was no basis in fact for the Secretary's disapproval of the application, we conclude that the military judge's reason for denying the motion to dismiss was incorrect. However, the denial of the motion by the military judge was proper for another reason which precludes our affording relief to the appellant.

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[6] This provision was upheld by the Supreme Court in Clark v. Gabriel, 393 US 256 (1968).

[7] Applications cannot be entertained when based solely on conscientious objection which existed but was not claimed prior to induction or enlistment or when based solely on a conscientious objection that was claimed and denied by the Selective Service System before induction. Department of Defense Directive 1300.6, 10 May 1968, paragraph IVB2.

In United States v. Noyd, *supra*, the Air Force regulation under consideration provided that a conscientious objector was to be assigned duties providing "minimum conflict with his professed beliefs" while his application was pending consideration by the Secretary. Paragraph VIB2, Department of Defense Directive 1300.6, 10 May 1968, provides that:

> "Pending decision on the case and *to the extent practicable*, the person will be employed in duties which involve the minimum conflict with his asserted beliefs." (Emphasis added.)

The Army regulations in force while the appellant's applications were pending contain similar provisions. See paragraph 6, AR 635-20, 17 August 1968, and the same paragraph of the same regulation, dated 16 October 1967, 27 May 1968, 3 December 1968, and 22 January 1969. As we view the regulations, they contemplate relieving an applicant from performing military tasks, such as training or instructing, but do not encompass relief from the duty of wearing the uniform. Obviously, it is impracticable in the military environment to permit the applicant to cast off his uniform. Thus, this case is distinguishable from *Noyd* where the applicant had previously been relieved of serving as an instructor pending action on his application. There, the legality of the order to fly as an instructor was dependent on whether the Secretary's disapproval of the application was lawful because the order would not have been given except for that disapproval and the applicant was entitled to relief from instructor duties pending the disapproval. Here, the lawfulness of the order to wear a uniform did not depend on the legality of the Secretary's decision because the order was legal even if the Secretary's determination was illegal, that is, made with

no basis in fact. Accordingly, the military judge's denial of the motion to dismiss was correct.

Contrary to the position taken in the dissenting opinion, we conclude that the order in this case is clearly distinguishable from the order involved in United States v. Bratcher, 18 USCMA 125, 39 CMR 125 (1969). In our opinion, the order to put on a proper uniform was a specific mandate. The appellant in testifying on the merits at trial admitted on cross-examination that he understood that the order required immediate compliance. After receiving the order, he advised the unit commander that he would not comply. See United States v. Bagby, —— CMR —— (ACMR 1970), where this Court held an order "to attend training" was a specific mandate and distinguished it from orders "to train" and "to resume training."

Assigned Error III is deemed meritorious. An inconsistent sentence results when a court-martial adjudges a punitive discharge and recommends administrative discharge in lieu thereof on the basis of the same evidence which was available for consideration in adjudging the sentence. United States v. Dillemuth, —— CMR —— (ACMR 1970). Here, as in *Dillemuth*, the military judge could have recommended an administrative separation without adjudging a bad-conduct discharge. We perceive no valid reason for changing the rule when the sentence is adjudged by a military judge rather than by court members. *See also* United States v. Lennon, —— CMR —— (ACMR 1969). Accordingly, the bad-conduct discharge must fall.

The findings of guilty are affirmed. Reassessing the sentence on the basis of the above-indicated error and the entire record, the Court affirms only so much of the sentence as provides for confinement at hard

labor for six months and forfeiture of $100.00 pay per month for six months.

KELSO, Senior Judge, concurs.

NEMROW, Judge, concurring and dissenting:

I concur with the determination by my brother judges that the findings of guilty of Charge II and its specification (the unauthorized absence offense) should be affirmed and that the sentence requires reassessment because of Assigned Error III.

I also concur in their conclusion that the military judge's reason for denying the motion to dismiss was incorrect. However, I disagree, in view of the special circumstances in this case, with their holding that the order to appellant—"to put on a proper military uniform"—was legal.

My review of the record leads me to conclude that all the facts and circumstances relevant to the scenario encompassing the giving of the order in question clearly indicate that it suffered from the deficiency afflicting the order in the *Bratcher* case (18 USCMA 125, 39 CMR 125 (1969)). The order in *Bratcher* was "to perform duties as a duty soldier." Reversing Bratcher's conviction, the Court stated the following:

> "The specifications and the stipulation in the case at bar make it crystal clear that the order did not contemplate performance or nonperformance of some *special function* but rather it was an order that the accused was to perform his duties as a soldier by obeying his superiors, an obligation he was already under by reason of his status as a soldier and as a subordinate to the Captain and the First Sergeant. . . .
>
> ". . . '[T]he order, whether it be oral or written, must be a *specific* mandate.' The 'order' in

this case dealt with no specific subject as such but was only an exhortation to the accused to do his duty as a soldier. No order is needed for that." (Emphasis in original)

This Court applying the principle of *Bratcher*, reversed the convictions in the following cases: United States v. Oldaker, —— CMR —— (1969); involving an order to train; United States v. Wohletz, —— CMR —— (1970), involving an order "to resume training"; United States v. Orozco, —— CMR —— (1970), involving an order "to start training."

The foregoing cases enjoin us to condemn orders which are "far too general and all-inclusive in scope," that is, an order which does not constitute a *specific* mandate, but merely exhorts one to perform an obligation that he is already under by reason of his status as a soldier. See United States v. *Oldaker*, supra.

Here, appellant, as a soldier on active duty, was required to obey the provisions of AR 670-5, dated 12 February 1968, which read, in pertinent part, as follows:

"The uniform will be worn when on duty by all male Army personnel. . . ."

The real basis for the order can be gathered from the tenor of Major Rekowski's testimony. I note specifically the following:

"Q. [by defense counsel]: Would you please detail for the court, Major Rekowski, the contents of your conversation with Private Goguen on the date the order was given?

"A. Well, as I previously stated, as I can recall, the first point of the discussion was the fact that his application had been denied and naturally I was interested in his recent appearance in

the federal court. I think he mentioned at that time the matter wasn't resolved in that area. I then stated, well, however, as far as the military is concerned your application has been denied and that is a final application and therefore, you are not to be treated as an applicant or potential CO and therefore, this hold status that he was in should be terminated and he should be returned to another unit. I then told him that the first step along this direction was to get into proper military uniform.

"Q. What was his reply to that?

"A. Well, he stated that his conscience would not allow him to comply with that order. I again tried to explain it in different terms. I'm sure he understood the first time, but I wanted him to have, give him every opportunity to comply, explain the dire consequences, the fact that he wore a uniform prior to this, why now should he suddenly say no. He answered that while his application was pending he could play the game, so to speak, he could comply with various rules and regulations, but now that the decision had been made he had to just live up to the dictates of his conscience and he just couldn't comply any more.

"Q. At that time, did he strike you as being sincere in his statement?

"A. His manner of presenting himself, his tone of voice, it was sincere, yes.

I do not perceive from the entire testimonial record a specific mandate to appellant, but an order so intertwined with appellant's claim for conscientious objector status that it was, as described by Major Rekowski, merely an end to a ball game:

"Q. Then, you are telling this court then that after this discussion with Private Goguen, know-

ing his past record, knowing he had just returned from an absence and knowing that he had also filed a writ of habeas corpus in a federal court and after continuously telling you he wouldn't put on a uniform, you thought by giving him an order he would change his mind?

"A. Yes, because he had run out of his alternatives. Up until this time he had applications pending and there are, therefore, he had a certain flexibility. Now, the door had been closed, the application had been denied and therefore, this flexibility did not exist and I expect as a man who puts in an application, a man expects either a yes or no answer. He must expect either and he got a no answer, he must exhibit as a man and must comply with the regulation.

"Q. Why is that?

"A. Why? Because we don't play in a game and expect to win. We hope to win, but it's possible we might lose and if we lose we must accept that as well.

"Q. In other words, because the Department of the Army says he is not a conscientious objector, does that change his status?

Accordingly, it is my view that the order concerning the wearing of the uniform was not lawful and that appellant's conviction of Charge I and its specification, as a matter of law, cannot stand.

OFFICIAL:

/s/ William O. Morris
WILLIAM O. MORRIS
Captain, JAGC
Clerk of Court

[SEAL]

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